

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student v. Agawam Public Schools                      BSEA #1504488  
& Melmark-New England, Inc.**

**DECISION**

**INTRODUCTION**

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766,” (MGL c. 71B) the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

**SUMMARY OF BACKGROUND AND PROCEDURAL HISTORY**

The chronology of procedural events occurring before the hearing on the merits in this case is set forth in the *Ruling on Parents’ Motion to Enforce Stay Put*, issued on April 28, 2015 and is summarized below for convenience.

The instant case arises from Parents' second hearing request. Parents filed the first request in 2013 (Case No. 1403554). In that case, Parents sought an order directing the Agawam Public Schools (Agawam or School) to fund a residential educational placement for Student. On January 16, 2014, after an evidentiary hearing, BSEA Hearing Officer William Crane issued a decision (hereafter, “*Decision I*”) concluding that the Student needed a residential educational program in order to receive a free appropriate public education (FAPE). That Hearing Officer ordered the Agawam Public Schools (Agawam or School) to apply for Student’s admission to two such residential schools, New England Center for Children (NECC) and Melmark-New England (MNE). The Hearing Officer further ordered Agawam to convene a Team to identify additional potential residential placements if neither MNE nor NECC accepted Student. MNE did accept Student, who began attending on April 8, 2014.

Beginning in approximately May 2014, conflicts arose between the Parents and MNE regarding such matters as planning for Student’s home visits, Parents’ attendance at planning meetings and Parents’ compliance with MNE’s schedule for on-campus visits with Student. In sum, MNE concluded that Parents were failing to cooperate with MNE protocols designed to begin planning for the Student’s visits to his home, as well as for Student’s eventual return to his home at some point in the future. Parents, on the other

hand, contended that MNE was attempting to unilaterally impose a visitation plan which was less flexible than MNE had represented before Student enrolled, and which did not adequately consider the safety concerns that had precipitated Student's need for residential placement.

In June 2014, concerned that Parents' alleged conduct would jeopardize Student's MNE placement, Agawam filed a *Motion for Compliance* with the *Decision* in BSEA No. 1403554, seeking a BSEA order directing Parents to cooperate with MNE. Oral argument on this *Motion* took place on November 17, 2014, after numerous exchanges of documents and several telephone conference calls. Subsequently, the parties reached an agreement providing that Parents would hold Agawam harmless for any alleged failure to comply with the *Decision* in BSEA No. 1403554, Agawam would withdraw the *Motion for Compliance*, and Parents reserved the right to file a second hearing request in the event that MNE proceeded to a "planned termination" of Student's MNE placement.

MNE did initiate the "planned termination" process pursuant to relevant state regulations in early December 2014. On December 19, 2014 Parents filed the instant hearing request in which they sought a determination as to whether MNE's policies as applied to Student with respect to home visitation denied Student a free appropriate public education (FAPE). With their hearing request, Parents filed a *Motion to Enforce Stay Put*. On April 28, 2015 after a two-day hearing, a ruling was issued which granted Parents' *Motion* and established MNE as Student's "stay put" placement.

A hearing on the merits of Parents' hearing request was held on January 4, 5, and 6, 2016 at the office of Catuogno Court Reporting Services in Worcester, MA.

Those present for all or part of the proceeding were:

Student's Father	
Rita Gardner	Executive Director, MNE
Helena Maguire	Senior Director of School Services, MNE
Kimberly Duhanyan	Director of Residential Services, MNE
John Demanche	Director of School Services, MNE
James Luiselli	Behavioral Psychologist, Consultant to MNE
April Rist	Director, Special Services, Agawam Public Schools
Kimberly Cass	Supervisor, Special Services, Agawam Public Schools
Nina Marchese	Supervisor, Approved Private Special Education Schools, Mass. Dept. Elementary and Secondary Education (DESE)
Matthew Engel, Esq.	Attorney for Parents
Peter L. Smith, Esq.	Attorney for Agawam Public Schools
William Hunt, Esq.	Attorney for MNE
Blakely E. Markham, Esq.	Attorney for MNE
Sara Berman, Esq.	Hearing Officer, BSEA
Darlene M. Coppola	Court Reporter

The record in this matter consists of Parents' Exhibits P-1 through P-22, Joint Exhibits of MNE and Agawam (hereafter Joint Exhibits or JE), JE-1 through JE-46 and JE-47, and Agawam's Supplemental Exhibits A-1 through A-23 and A-45. The record also consists of three days of tape-recorded testimony and argument as well as the transcript created by the court reporter. In addition, the record incorporates all documents and transcribed testimony from the hearing on the Motion to Enforce Stay Put.

### **ISSUE PRESENTED**

The sole issue for hearing is the following: "Whether the home visitation requirement as formulated for Student by MNE fails to afford Student a free, appropriate public education."

### **POSITION OF PARENTS**

Because of his disabilities, Student has behaviors that put him at risk of serious injury. The decision of the hearing officer in the prior BSEA proceeding to order residential placement was based, in large part, on evidence that it was very difficult for Parents to keep Student safe at home. While Parents do not object to Student's making home visits, or to participating in the training by MNE staff that is a pre-requisite for such visits, they have objected to what they have perceived as MNE's insistence on moving forward with visits regardless of Student's progress in the area of safety. They also object to MNE's requirement for in-person, on-site attendance at certain meetings without consideration of unique hardships that this requirement might cause the family. Notwithstanding their reservations, for the past year and one-half, Parents have conveyed their willingness to engage in Parent training and to have Student visit at home, only to have MNE refuse to move forward with the visits and trainings which it states are a fundamental component of the MNE program.

Because of MNE's refusal, it is impossible to determine whether or not the visits as conceived by MNE are a necessary component of FAPE for Student. The only reasonable outcome of this proceeding is an order directing MNE to implement the training and visitation protocol on a trial basis, and then to assess Student's response.

### **POSITION OF MNE**

MNE argues that state regulations authorize DESE-approved private special education schools such as MNE to conduct "planned terminations" of publicly-funded students in appropriate circumstances, provided that the private school and sending public school district follow the procedures set forth in those regulations. In December 2014 and January 2015, MNE conducted such a planned termination of Student. The parties have explicitly agreed that in so doing, MNE and Agawam complied with all pertinent state regulations.<sup>1</sup>

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<sup>1</sup> While Parents do not dispute MNE's and Agawam's compliance with state regulations during the planned termination of Student, they have reserved the right to challenge the validity of the regulations themselves.

From the date of termination forward, Student's status at MNE has been that of a terminated student on "stay put" status. The BSEA's only authority over MNE would be to order it to provide the due process mandated by the state regulations governing planned terminations. Because MNE (and Agawam) provided this due process, the BSEA has no authority to compel MNE to retain Student at the conclusion of this proceeding. Moreover, because Student's enrollment has been terminated correctly, any evidence of events after the date of termination—including Parents' stated willingness to agree to parent training and a trial of home visitation—is irrelevant. If the BSEA were to issue an order for a trial of visitation as requested by Parents, it would be acting outside of its authority. Finally, MNE is a highly respected as a premier facility for education of students with autism. An essential feature of the MNE program is its commitment to preparing students to move to less restrictive environments according to a carefully-designed protocol. The relief sought by the Parent amounts to a fundamental alteration in the MNE program by the BSEA, and is outside of the scope of BSEA authority.

### **POSITION OF AGAWAM PUBLIC SCHOOLS**

Agawam adopts the position of MNE.<sup>2</sup> In addition, Agawam notes that Student has not been in his home for a visit since 2013 and argues that because of the Parents' failure to cooperate with MNE's program, Student has been and is being deprived of FAPE in the least restrictive environment (LRE).

### **SUMMARY OF EVIDENCE**

1. The entire *Decision* issued in Case No. 1403554 as well as the administrative record, exhibits, and *Ruling on the Motion to Enforce Stay Put* issued in this matter on April 28, 2015, are incorporated by reference in this *Decision*. For purposes of efficiency and clarity, many of the uncontested statements of the evidence set forth in the *Ruling* are fully or partially reproduced here.
2. Student is a thirteen-year-old boy who has multiple disabilities including Autism Spectrum Disorder (ASD) and an intellectual disability. The Agawam Public Schools (Agawam) is the Local Education Authority (LEA) responsible for Student's special education services. Since April 2014 Student has been a residential student at MNE in Andover, MA pursuant to IEPs issued by Agawam. At all relevant times, Agawam has funded Student's placement at MNE.
3. Student's disabilities affect all areas of his functioning, including his ability to learn, communicate, care for himself, and protect himself in an age-appropriate manner. While living in Parents' home, Student engaged in dangerous behavior such as leaving the house alone, bolting from Parents, and engaging in pica<sup>3</sup> as well as in some self-injurious behavior such as skin picking. While these behaviors have diminished since

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<sup>2</sup> In this Decision, "MNE" should be read to also include Agawam, unless otherwise indicated.

<sup>3</sup> Pica is the ingestion of non-food substances.

Student's placement at MNE, they persist to some degree. (JE-30) There is no dispute at this time that Student continues to require a residential educational placement to provide him with FAPE by teaching him skills to behave safely both within and outside of the school setting.

4. Student has many strengths. He is socially alert and interested, physically adept, good-natured and affectionate, and able to learn new skills. Student can request desired objects and activities by pointing to icons in his PECS<sup>4</sup> book, by use of a few signs, and by leading an adult to the desired item. Student is able to understand and follow some directions. He can play simple ball games with peers and return greetings. He enjoys rollerblading and other community activities with his family. Student eats a wide variety of foods and can eat meals and snacks independently. He is able sit in group instruction for up to five minutes and can engage in academic activities such as sorting, completing puzzles, and matching icons and objects. With support, Student is learning a variety of daily living skills including dressing, toileting, and showering. (JE-30, Testimony of Father)

5. The parties agree that Student's educational program should be based on principles of Applied Behavioral Analysis (ABA), such that his instruction in all areas—including academics, adaptive and self-help skills, communication, and behavior—is highly individualized and data-driven. Much or most of Student's instruction should be provided via discrete trial teaching (DTT). The parties also agree that Student needs a high degree of structure and support across all settings.<sup>5</sup> (JE-30)

6. Parents began exploring MNE as a possibly appropriate setting for Student in approximately August 2013. (Testimony of Father) On January 16, 2014, BSEA Hearing Officer Crane issued *Decision I* in BSEA No. 1403554, which ordered Agawam to fund a residential educational placement for Student, and further directed Agawam to fund Student's placement at one of two schools if either accepted Student and had an available slot for him: MNE and New England Center for Children (NECC). MNE accepted Student for enrollment.

7. Melmark New England (MNE) is a division of Melmark, Inc. which is a private organization that operates programs for persons with disabilities in Massachusetts and Pennsylvania. MNE provides a variety of services for children and adults with autism and other developmental disabilities and accompanying behavioral challenges. MNE's program includes a DESE-approved private special education school that serves both day and residential students. (Testimony of Gardner, Marchese, JE-3)

8. According to one of many "Melmark New England Polic[ies] & Procedure[s]," MNE has adopted the philosophy that "effective rehabilitation for people with disabilities

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<sup>4</sup> PECS stands for Picture Exchange Communication System.

<sup>5</sup> When Student first enrolled at MNE he was provided with 1:1 supervision. The most recently proposed IEP, issued in November 2015, calls for a gradual shift from a 1:1 to 1:2 adult/child ratio. Parents have rejected this proposed change. Despite this disagreement, there is no dispute that Student requires close adult oversight at all times.

requires individualized and multidisciplinary programming emphasizing ongoing assessment and evaluation.” MNE’s goal for the individuals it serves is to “increase their independence while enhancing their quality of life and opportunities to succeed within their community.” (JE-31)

9. MNE’s primary teaching approach is ABA, that is, an “evidence based” methodology that uses data from “the child’s individual student performance to inform progress and move them towards the least restrictive environment.” (Testimony of Gardner, Tr. Vol. II, p. 203-204)

10. This principle of least restrictive environment (LRE) is a fundamental component of MNE’s program, and is the underlying goal of its ABA approach. Specifically, program staff members use data to assist students with progressing from situations of greater supervision and support to increased independence. This progression towards independence is a goal in all domains, including academics and daily living skills and, for residential students, movement towards reunification with family.

11. In particular, MNE views the return of residential students to their families and communities whenever possible as a goal for nearly all students, and this goal informs the programming for those students across all settings. (Testimony of Gardner, JE-31)

12. MNE expects the parents and guardians of residential students to work collaboratively, in partnership with MNE, in order to help their children move in the direction of reunification. Essential components of this process are meetings and parent trainings held at specified intervals after a child enters the program as well as an assessment of the child’s home environment to ensure that it is safe and/or to suggest modifications to accommodate the child. Depending on the child’s behavior and the parents’ skill level, initial visits may be as brief as an hour or two, and staff may accompany the child. The goal is to increase the frequency and duration of visits while decreasing staff supervision. (JE-31, Testimony of Gardner, Maguire, Duhanyon)

13. In addition to individualized home visits, all residential students are expected to return to their homes for two annual week-long vacation periods in July and December when the school is closed. Under some individual circumstances, MNE may waive this requirement. (JE-31, Testimony of Gardner, Maguire, Duhanyan)

14. Prior to enrollment and throughout the enrollment process, MNE informs parents of prospective residential students of the program’s requirements for family involvement and its commitment to eventually returning children home whenever possible. Before students enter MNE, parents receive a lengthy and detailed “Family Handbook” describing virtually every aspect of MNE from staff qualifications to guidelines for parent-staff conversations. The Handbook is over 100 pages long and contains copies of all relevant policies and procedures. Subsequently, parents may meet with a program administrator who reviews the Handbook with them using a checklist that summarizes its essential elements. Parents indicate their understanding by initialing each point in the

checklist. MNE takes the foregoing steps to ensure that parents fully understand the program before committing to it. (JE-18, 31, Testimony of Gardner)

15. MNE's policies and procedures as contained d in its Family Handbook comply with DESE requirements for approval of private special education schools to receive public funding. DESE has commended MNE for the quality of its written policies and procedures. Continued DESE approval is contingent upon MNE following its own policies and procedures and documenting that it is doing so. (Testimony of Marchese)

16. Student began attending MNE as a residential student on April 8, 2014. During the months prior to his enrollment Parents and MNE staff conversed and met numerous times to discuss Student's transition to MNE. Parents and MNE executed multiple documents purporting to outline the terms and conditions of Student's enrollment. The relevant conditions in this case are MNE's requirements that all parents work collaboratively with MNE towards the goal of family reunification, that all parents understand that students must go home for scheduled school closings and work with staff to make that possible, and that all parents meet with MNE staff approximately 30 days after enrollment to begin planning for home visits.<sup>6</sup> (Testimony of Gardner, Maguire, JE-31)

17. On or about February 14, 2014 MNE provided Parents with the MNE Family Handbook. Parents read the Handbook thoroughly. (Testimony of Gardner, Father)

18. On February 25, 2014 Parents and representatives from Agawam and MNE met to discuss Student's impending transition to MNE. Parents and MNE representatives discussed the Family Handbook at this meeting and in particular discussed the twice-yearly school closures, required meetings and parent trainings to prepare for the closures and other home visits, and the long-range goal of family reunification. (Testimony of Father, Gardner, Cass)

19. On March 12, 2014 Parents had an orientation meeting lasting several hours with Rita Gardner during which they reviewed the orientation checklist referred to above with Ms. Gardner and initialed each item to indicate their understanding. (Testimony of Father, Gardner, JE-18)

20. On March 19, 2014 Agawam convened a Team meeting to amend Student's IEP to call for residential placement at MNE. Parents as well as representatives from Agawam and MNE attended the Team meeting. Under the section entitled "Additional Information" the IEP amendment generated at this meeting stated the following:

[Student] is a residential student who will receive residential programming 7 days a week/24 hours except for holiday and residential program closings with required parental home visitation. Determination for deviating from the current residential program

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<sup>6</sup> Such planning includes review of the student's progress on IEP goals, an assessment of the home situation for safety factors, and parent training.

calendar and program closings will be made by the [MNE] clinical team in writing to the family. In order to be prepared for residential program closings, it is expected that families will plan for the closings and attend and actively participate throughout the year in parent trainings designed to re-integrate the student with their family in the least restrictive environment. Upon [Student's] first 30 days in the residence, the parents will attend a meeting with MNE staff to discuss his transition and begin the process of participating in parent support and education to ensure gains will be made towards successful family re-unification in planning for home visits monthly and school closing weeks. (JE-24)

21. Parents accepted the IEP amendment described above and consented to the MNE residential placement on or about March 28, 2014. (P-18)

22. During February or March 2014 MNE had provided Parents with a document entitled "Parent Participation Consent." A representative from MNE and both Parents signed this document on March 20, 2014. This document contained the following relevant statements:

- All parents are required to collaborate and participate in their child's educational programming.
- [MNE's] goal is to return all children to their family home after successful educational placement.
- [I]t is understood and agreed that the program may be closed for legal holidays and vacation periods...
- All children will participate in the (2) week-long closings per year, unless...it is determined [by the Chief Clinical Officer and CEO] that a whole week would be a safety issue.
- Termination proceedings and discharge from the program may occur if the Student's parents...have failed to comply with the provisions of the above agreement.

23. Parents voiced no objections to any of the provisions governing home visits, program closings or required parent trainings during the meetings which they attended prior to Student's admission to MNE. (Testimony of Gardner, Cass) Had they done so, MNE likely would not have accepted Student for admission. (Testimony of Gardner)

24. Father testified that throughout Parents' pre-admission dealings with MNE, MNE staff led Parents to believe that MNE would be flexible on such issues as reunification, parent training and school closings. Parents anticipated a highly fluid process for determining whether and when Student could safely come home, and whether MNE would require in-person attendance at meetings and parent trainings. (Testimony of Father)

25. MNE denied making representations that it would be flexible regarding the in-person attendance at meetings and parent trainings. (Testimony of Gardner, Maguire) Credible evidence submitted by MNE—for example, its *Family Handbook* --notes its strong commitment to family reunification and a highly structured protocol for achieving this goal. Although MNE voices and demonstrates a commitment to collaborating with parents and has developed a structure for doing so, there is no evidence in the record of MNE presenting itself as more flexible with its procedures than it actually is. I conclude that Parents had ample notice of MNE's philosophy and method of operation in advance of consenting to Student's placement.

26. Of the approximately forty-four students now enrolled residentially at MNE, only Student and one other child have not experienced some amount of home visitation during the period of Student's enrollment. These visits generally have been successful, even with children whose behavior is more challenging than Student's. (Testimony of Gardner)

27. In April 2014, approximately two weeks after Student's admission to MNE, MNE staff began trying to schedule the 30-day meeting with Parents. MNE could not get Parents to return phone calls or commit to a date for a meeting.

28. During May 2014, Parents, through their attorney, attempted to negotiate with MNE for adjustments in the meeting protocol to allow for telephone participation in at least some of the meetings. Parents also asked MNE to consider holding meetings and training sessions on Sundays, since Parents visited Student every Sunday and would be on the premises.

29. Among the reasons put forward for these adjustments were Father's diagnosis of narcolepsy which made the prolonged drive from Agawam to Andover dangerous. In addition, there are family circumstances that make travel to meetings difficult. Parents have two other children to care for at home, one of whom has a disability. Father works full-time. Finally, Mother is the full-time caregiver for Student's grandmother, who lives in the family home and has physical disabilities and dementia. (Testimony of Father, P-8)

30. A meeting was finally scheduled for June 6, 2014. After the meeting was scheduled, Parents reported their intention to attend via speaker phone. MNE indicated that at least one Parent needed to attend in person. On June 6, 2014, the date set for the meeting, Parents did not appear. MNE staff waited for 10 minutes, at which point an assistant notified them that Parents were on the phone, attempting to join the meeting. Upon receiving this information, MNE adjourned the meeting because staff felt they would not be able to present and review Student's data sheets without Parent being present. (Testimony of Father, Maguire, Gardner, Cass)

31. A meeting eventually took place on June 26, 2014, attended by Father, Rita Gardner, Helena Maguire, and Frank Bird (MNE's CEO, Senior Director of School Services and Chief Clinical Officer, respectively) as well as Kimberly Cass from the Agawam Public Schools. (Testimony of Maguire) At that meeting, MNE personnel reiterated concerns about difficulty that MNE had experienced with scheduling the thirty-

day meeting, as well as concerns about communication problems generally as well as issues such as Parents visiting Student in the MNE residence later than the allowed times for visitation. MNE had come to question whether the placement would be viable, given that Parents seemed disinclined to adhere to agreements they had made prior to Student's placement. (Testimony of Maguire)

32. On June 27, 2014, Parents rejected the previously-accepted "additional information" portion of the IEP amendment issued in March 2014. (This provision is quoted verbatim in Paragraph 19, above). In their letter accompanying this partial rejection, Parents stated that they could not "delegate exclusive decision making to a clinical team in the areas of safety. Life and death safety decisions will always be a parental prerogative, and we are willing to share decision making but not relinquish it.."

(JE-19).

33. MNE's summer week-long closing was scheduled for July 2014. MNE granted a waiver which allowed Student to stay at MNE during the period of closure. The waiver was based on Student's short tenure at MNE as well as the inability of the program to schedule a 30-day meeting, home safety assessment and parent training in time for Student to return home for the planned closing. (JE-20)

34. In a conversation on or about May 1, 2014 Father told MNE that Parents had removed safety environmental modifications from the home (certain door locks, etc.) so that it would be unsafe for Student to visit there. (JE-9, Testimony of Duhanyan) According to Father, however, Parents were informed by the environmental modification company that the modifications violated the fire codes and were no longer permitted to be used. (Testimony of Father)

35. On August 13, 2014 MNE staff conducted a home safety assessment and provided Parents with a list of home modifications and accommodations to be made in preparation for a home visit by Student. Parents responded with a letter dated September 14, 2014 in which they stated that the proposed modifications were either inappropriate or financially burdensome. (P-13, 14)

36. In a letter to Parents dated November 5, 2014 MNE Chief Clinical Officer Frank Bird proposed a brief (two to three- hours) home visit for Student to take place at the end of that month. Student would be accompanied by staff for that visit. The letter further proposed one or more visits of the same duration during December, this time without MNE staff. The letter proposed setting up a training schedule for Parents to prepare for these visits. (P-20) Parents agreed to participate in the training and November visit; however, MNE cancelled the plan because it would involve a deviation from the original protocol for meetings and parent trainings. (Testimony of Gardner)

37. In a letter dated December 1, 2014 MNE requested that Agawam convene a Team meeting to initiate a "planned termination" of Student's placement. The date of such termination, initially set for January 18, 2015, was extended by MNE during the course of these proceedings. There is no dispute that at this time, however, the termination

process has been completed. Student's attendance at MNE has continued without interruption, and at present he continues to attend MNE pursuant to the Stay Put order issued on April 28, 2015.

38. On November 20, 2015, after an annual review meeting, Agawam issued an IEP covering the period November 2015 to November 2016. The IEP called for continued residential placement. In the section entitled "additional information," the IEP recommended "home visits with increased time as recommended by [MNE] staff," along with necessary training for Parents. (JE-25)

39. In a letter dated December 18, 2015 Parents partially accepted and partially rejected the proposed IEP. The pertinent partial rejection stated that "[w]e accept the concept of [Student] making visits to our home. We reject the language that gives Melmark exclusive decision-making authority over the scheduling and duration of the visits. We request that...an initial home visit not...exceed two (2) hours...Following the initial home visit, The Team...will reconvene to discuss what happened during the visit and then attempt to reach an agreement about the scheduling and duration of the next visit home..." (JE-25)

40. MNE has declined to schedule any home visits for Student. Its position is that to do so would be contrary to its established protocol, since Parents never attended the initial required meetings after Student's placement. (Testimony of Maguire)

41. For the entire duration of this case, Student has continued to attend MNE. Parents visit Student nearly every Sunday for several hours. (Testimony of Father, Duhanyan)

42. While Parents and MNE have had some disagreements about goals and objectives, there is no dispute that Student is benefiting from his placement at MNE. MNE and Agawam contend, however, that Student is not receiving FAPE because he has not been able to make home visits; therefore, he has been unable to learn to generalize skills to his home and community. (Testimony of Maguire, Duhanyan, Cass)

## **DISCUSSION**

The issue before me is whether the home visitation policies of MNE together with the attendant requirements for parent training, meetings, home assessments and the like, as applied to Student, constitute a denial of FAPE, as asserted by Parents. As the moving party, Parents have the burden of proving this claim by a preponderance of the evidence. *Schaffer v. Weast*, 126 S. Ct. 528, 441 IDELR 150 (2005).

After reviewing the record in this case and considering the arguments of the parties, I conclude that Parents have not met this burden. Parents have presented no evidence in the form of evaluation reports or witness testimony to the effect that Student could not safely progress to home visitation, particularly in light of the high degree of support, training, and scaffolding offered by MNE.

Underlying this explicit issue is a more complex one, namely, whether the BSEA has the authority to order a private special education school to alter its usual manner of delivering services to accommodate an individual publicly-funded student. I will first address the issue of home visitation, and then the issue of BSEA authority over MNE's programming.

Parents argue that MNE has insisted on imposing its programmatic requirements in a manner that is arbitrarily rigid, and fails to consider the Parents' realistic safety concerns for their child as well as the hardship caused for the family by MNE's insistence on, *e.g.*, in-person attendance by parents at meetings. Parents further argue that prior to Student's actual placement at MNE they were led to believe that MNE's requirements were more flexible than they turned out to be after Student was placed.

In addition, Parents noted that Student's pulling away and bolting behavior had not been extinguished, and that Student had not fully mastered the "stop and wait" program. Father testified that while Student had benefited from much of MNE's programming, he was still the "same [Student]" with respect to bolting behavior. Parents feared that once outside the confines of MNE, Student could break away from Parents and run into the busy street in front of their home or into other dangerous situations. Parents believed that it would be impossible for them to provide the degree of constant 1:1 supervision that they believe Student needed to remain safe in his home.

That said, Parents stated that they have reached out to MNE in an attempt to schedule meetings and home visits, only to be met with MNE's refusal to collaborate. Parents contend that by this refusal MNE has acted in an arbitrary, discriminatory and retaliatory manner<sup>7</sup> thereby causing the very FAPE denial for which they blamed Parents. Parents further argued that the only way of truly determining whether the home visitation component of the MNE program would provide Student with FAPE would be to implement that component and evaluate the results.

MNE (with the agreement of Agawam) maintained that its protocol for meetings, parent trainings, and home visits is a fundamental component of its program and critical for implementing the program's goal of enabling students to move to less restrictive settings. MNE asserts that its process is highly structured, with little room for variation, because the structure has proven to be successful with the population of students that MNE serves. MNE further points out that its policies and procedures are clear and explicit, and have earned commendation from DESE. Additionally, according to both MNE and DESE, continued approval is contingent on MNE's consistent adherence to its own stated policies and procedures. MNE and Agawam state that MNE cannot provide Student with FAPE because by their partial rejection of Student's IEP, Parents have deprived MNE of the ability to fully prepare Student to progress to a less restrictive environment

MNE's further contended that Parents were well aware of MNE's policies and agreed to them in advance of placement with full knowledge of their own family situation

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<sup>7</sup>Parents have not developed formal claims of discrimination or retaliation in this matter.

and personal limitations. With respect to starting a trial of visits at this time, MNE argued that Student's enrollment at MNE was properly terminated in December 2014 and January 2015, and that MNE is not required to conduct a "do over" for a terminated student. Moreover, any attempt to now revisit the meeting/training/visitation process would be contrary to MNE's established method of operation, and contrary to MNE's position that they were not able to implement an important portion of the IEP due to Parents' rejection.

Parents clearly would have preferred more flexibility by MNE in its approach to them and to the entire parent involvement/home visitation component of its program. In light of the many competing demands on Parents' time, attention, and stamina imposed by highly challenging family circumstances, this preference is understandable. However, MNE's strict adherence to its own protocol did not constitute a denial of FAPE to Student

Moreover, Parents' concerns are not supported by evidence that the rejected portions of the IEP and the MNE programming to implement those portions were inappropriate. The overwhelming and largely uncontested weight of the evidence is that the home visitation component of the MNE program was structured to ensure student safety to the extent possible. Before a visit could place, parents were required to attend meetings, observe their child in school, make home modifications, and undergo hands-on training with staff support. If necessary, initial visits could be very short, and staff could accompany the child on visits. Parents and staff were expected to communicate and examine data after visits and make adjustments as needed. Virtually every child now attending MNE, including children whose behaviors were more challenging than Student's, has experienced some type of home visitation. MNE testimony that these visits have been successful is not contradicted by any evidence in the record.

MNE and Agawam emphasized the importance of educating Student in the least restrictive environment (LRE) appropriate in light of his unique needs. As the parties well know, the concept of FAPE encompasses the principle LRE; that is, to the maximum extent appropriate, a student with disabilities must be educated with students who do not have disabilities, and "removal...from the regular educational environment [should] occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily." See 20 USC Sec. 1412(a)(5)(A); G.L. c. 71B §3. On the other hand, the opportunity to be educated with non-disabled students does not cure a program that otherwise is inappropriate. *School Committee of Town of Burlington v. Dept. of Education of Mass.*, 471 U.S. 359 (1985). The LRE mandate must be balanced with Student's entitlement to a program that will provide him with meaningful educational benefit by "measurably advancing the child toward the goal of increased learning and independence." *D.B., et al v. Esposito, et al.*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012)

LRE has different meanings for different children, depending on their needs. At this time, LRE for Student entails opportunities to spend time and learn to function outside of the confines of MNE, that is, in his home and in the community. Home and community are the natural environments for most school-aged children without

disabilities. The evidence demonstrates that the MNE program with respect to home visitation was calculated to “measurably advance[e] [Student] toward the goal of a setting that increased learning and independence.” *Id.*

Finally, Parents argued that MNE has thwarted Student’s receipt of FAPE because it has refused to provide a trial of Parent training and home visitation beginning in approximately November 2014. While such a trial might have been ideal, and nothing in this *Decision* prohibits the parties from agreeing to one at this time, I am persuaded that the BSEA lacks authority to order MNE to revamp its method of delivering services and instruction in order to conduct the trial sought by Parents. Additionally, I am persuaded that such a change might fundamentally alter the nature of the MNE program, and there is no basis to conclude that the BSEA has the authority to order MNE to do so.

In the *Ruling on Parents’ Motion to Enforce Stay Put*, in this matter, I determined that the BSEA did have authority to issue a “stay put” order directed at MNE. Consistent with prior BSEA rulings on point, most of which also concerned the issue of “stay put,” I found that the pertinent state regulations governing the procedure for planned termination did not immunize private special education schools from the foundational procedural protections of the IDEA’s “stay put” mandate. For the BSEA to direct a “stay put” order to private schools, in circumstances such as those in the present case, could be necessary and appropriate to effectuate the relevant portions of the statute. The pertinent statutory and case law is contained in the *Ruling*, and will not be restated here.

This case is now in a different posture. While Student has remained at MNE pursuant to the *Ruling on Parents’ Motion to Enforce Stay Put* issued in April 2015, that *Ruling* was limited to Student’s placement during the pendency of this appeal. In light of the Parties’ agreement that MNE followed all requisite procedures for planned termination of Student’s enrollment, there simply is no basis for ordering a trial of home visits at this juncture. Student is no longer enrolled at MNE pursuant to the “Planned Termination.”

### **CONCLUSION AND ORDER**

Based on the foregoing, within ten days from the date of this *Decision*, Agawam is ordered to reconvene the Team to for the purpose of locating or creating a residential educational placement for Student capable of implementing the accepted portions of his IEP. All parties are instructed to cooperate fully with this process.

By the Hearing Officer:

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Sara Berman  
Dated: March 2, 2016

